A **PJI-LFGC (VIETNAM) LTD**

v.

Q2 ENGINEERING SDN BHD

B COURT OF APPEAL, PUTRAJAYA
ZAINUN ALI FCJ
SULAIMAN DAUD JCA
RAMLY ALI JCA
[CIVIL APPEAL NO: W-02(IM)(NCC)-2123-2011]
C 5 DECEMBER 2011

CIVIL PROCEDURE: *Service - Service out of jurisdiction - Writ of summons and statement of claim - Order of court for service effected at address in Vietnam - Whether service at appellant's director's address in* D *Kuala Lumpur valid - Whether documents served personally on director - Whether service regular*

CIVIL PROCEDURE: *Service - Service out of jurisdiction - Writ of summons and statement of claim - Order of court for service effected at address in Vietnam - Whether service at Malaysian address valid -* E *Whether court order varied to allow service within jurisdiction - Whether service regular - Rules of the High Court 1980, O. 11 r. 5*

The claim in the present appeal, for loss of profits and for work done in Hanoi, Vietnam, arose from the alleged breach of contract F by the defendants in the court below. The appellant/first defendant was a company incorporated in Vietnam with a registered address and business address in Vietnam whereas, the respondent/plaintiff was a private limited company incorporated in Malaysia. The respondent filed an *ex parte* application pursuant to G O. 6 r. 1 of the Rules of the High Court 1980 ('RHC') for leave to issue and serve the notice of writ out of jurisdiction and the writ of summons and statement of claim out of jurisdiction against the appellant at the addresses in Vietnam. The High Court allowed the application on 23 December 2010 which clearly stated H the documents must be served on the appellant at the address stated therein or at any other address in the same jurisdiction ie Vietnam. However, the respondent served the writ of summons and the statement of claim on one Mr Lee Khen Shen at the Malaysian address alleged to be the appellant's business address I in Malaysia. Subsequent to the service of the documents, the respondent made an *ex parte* application to vary the court order dated 23 December 2010 ie to change the address for service. The application was allowed but the service was to be done

through the Government of the Socialist Republic of Vietnam at the appellant's address in Vietnam. The appellant thus filed an application to set aside the service of the writ of summons and the statement of claim pursuant to O. 12 r. 7 of the RHC. The application was dismissed and hence this appeal.

Held (allowing appeal with costs in cause)
Per Ramly Ali JCA delivering the judgment in the court:

(1) The court order dated 23 December 2010 was very clear that the documents must be served by the appellant at the given address in Vietnam. The writ and the summons of claim that was served on Mr Lee Khen Shen at the Kuala Lumpur address was clearly a case of non-compliance of the court order. The respondent failed to comply with the court order and deliberately chose to disregard it completely. The court order was never varied nor changed when the service was effected at the Kuala Lumpur address. (para 11)

(2) Although the court allowed the application for variation of the order, the new address for service was still in Vietnam. This was an indication that the respondent themselves knew that the service of the writ of summons and the statement of claim on the purported business address of the appellant in Kuala Lumpur, Malaysia was bad service. (para 15)

(3) The respondent elected to use Form 3 for "foreign writ" to issue the writ of summons instead of Form 2 for "local writ". They must therefore follow the procedure for service outside jurisdiction as prescribed in the court order and in compliance with O. 11 r. 5 of the RHC. (para 16)

(4) The appellant also denied having any business address in Malaysia and the Kuala Lumpur address was merely the appellant's director's, one Dato' Lee Peng Joo's "care of" or "c/o" address. However, the writ of summons and the statement of claim was never served on Dato' Lee Peng Joo personally, but to Mr Lee Khen Shen. The respondent did not explain who Mr Lee Khen Shen was and in what capacity was he accepting the service of the documents. Hence the service of the writ of summons and the statement of claim by the respondent on the appellant was irregular and bad in law and must be set aside. (paras 17-19 & 22)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Tuntutan dalam rayuan ini, untuk kerugian keuntungan dan kerja-kerja yang dijalankan di Hanoi, Vietnam, berbangkit daripada dakwaan kemungkiran kontrak oleh defendan-defendan di
B mahkamah bawahan. Perayu/defendan pertama merupakan syarikat yang ditubuhkan di Vietnam dengan alamat berdaftar dan alamat perniagaan di Vietnam manakala, responden/plaintif merupakan syarikat sendirian berhad yang ditubuhkan di Malaysia. Responden memfailkan permohonan *ex parte* menurut A. 6 k. 1 Kaedah-
C Kaedah Mahkamah Tinggi 1980 ('KMT') bagi kebenaran mengeluarkan dan menyerahkan notis di luar bidang kuasa dan writ saman dan penyata tuntutan di luar bidang kuasa terhadap perayu di alamat-alamat di Vietnam. Mahkamah Tinggi membenarkan permohonan tersebut pada 23 Disember 2010 yang jelas
D menyatakan bahawa dokumen-dokumen tersebut mesti diserahkan kepada perayu di alamat yang dinyatakan di dalamnya atau ke mana-mana alamat dalam bidang kuasa yang sama iaitu Vietnam. Walau bagaimanapun, responden menyerahkan writ saman dan penyata tuntutan kepada seorang yang bernama Encik Lee Khen
E Shen di alamat di Malaysia yang didakwa adalah alamat perniagaan perayu di Malaysia. Selepas penyerahan dokumen-dokumen tersebut, responden membuat permohonan secara *ex parte* untuk mengubah perintah mahkamah bertarikh 23 Disember 2010 iaitu untuk menukar alamat penyerahan. Permohonan tersebut
F dibenarkan tetapi penyerahan sepatutnya dibuat melalui Kerajaan Sosialis Republik Vietnam ke alamat perayu di Vietnam. Perayu dengan itu memfailkan permohonan untuk mengetepikan penyerahan writ saman dan penyata tuntutan berikutan A. 12 k. 7 KMT. Permohonan tersebut ditolak dan dengan itu, rayuan
G ini.

Diputuskan (membenarkan rayuan dengan kos dalam kausa) Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

H **(1)** Perintah mahkamah bertarikh 23 Disember 2010 adalah amat jelas bahawa dokumen-dokumen tersebut mesti diserahkan kepada perayu di alamat yang diberikan di Vietnam. Writ saman dan penyata tuntutan yang diserahkan kepada Encik Lee Khen Shen di alamat di Kuala Lumpur jelas merupakan
I suatu kes ketidakpatuhan perintah mahkamah. Responden gagal mematuhi perintah mahkamah dan sengaja memilih untuk tidak mengendahkannya. Perintah mahkamah tidak pernah diubah atau ditukar apabila penyerahan dibuat di alamat di Kuala Lumpur.

(2) Walaupun mahkamah membenarkan permohonan mengubah perintah, alamat baru untuk penyerahan masih di Vietnam. Ini menunjukkan bahawa responden sendiri mengetahui bahawa penyerahan writ saman dan penyata tuntutan ke alamat yang dikatakan sebagai alamat perniagaan perayu di Kuala Lumpur, Malaysia adalah penyerahan yang tidak teratur.

(3) Responden memilih untuk menggunakan Borang 3 bagi "writ asing" untuk mengeluarkan writ saman dan bukan Borang 2 bagi "writ tempatan". Mereka seharusnya mematuhi prosedur bagi penyerahan di luar bidang kuasa seperti yang dinyatakan di dalam perintah mahkamah dan mematuhi A. 11 k. 5 KMT.

(4) Perayu juga menafikan mempunyai apa-apa alamat perniagaan di Malaysia dan alamat di Kuala Lumpur hanyalah alamat "care of" atau "c/o" pengarah perayu, Dato' Lee Peng Joo. Walau bagaimanapun, writ saman dan penyata tuntutan tidak pernah diserahkan kepada Dato' Lee Peng Joo secara peribadi, tetapi kepada Encik Lee Khen Shen. Responden tidak menjelaskan tentang siapakah Encik Lee Khen Shen dan dalam kapasiti apa dia menerima penyerahan dokumen-dokumen tersebut. Maka penyerahan writ saman dan penyata tuntutan oleh responden kepada perayu adalah tidak teratur dan tidak sah dari segi undang-undang dan mesti diketepikan.

Case(s) referred to:

Afro Continental Nigeria Ltd v. Meridian Shipping Co SA [1982] 2 Lloyd's Rep 241 ***(refd)***

Pertubohan Berita Nasional Malaysia v. Stephen Kalong Ningkan [1982] CLJ 471; [1982] CLJ (Rep) 266 FC ***(refd)***

Sunkyong International Inc v. Malaysian Rubber Dvpt Corp Bhd [1992] 3 CLJ 1531; [1992] 1 CLJ (Rep) 310 SC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 6 r. 1, O. 12 r. 7, O. 11 rr. 5, 6

For the appellant - HL Wong (KS Cheah with him); M/s Azman Davidson
For the respondent - Celine Chelladurai (Oommen Kurien with her); M/s Zaid Ibrahim & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D-22NCC-2275-2010]

Reported by S Barathi

A

JUDGMENT

Ramly Ali JCA:

Introduction

B **[1]** The appellant in the present appeal, PJI-LFCG (Vietnam) Ltd was the 1st defendant at the court below.

[2] The present appeal is against the decision of the High Court dated 5 August 2011 dismissing the appellant's application to set C aside the service of the writ of summons and the statement of claim on the appellant by the respondent (the plaintiff at the court below).

[3] The respondent (Q2 Engineering Sdn Bhd) filed an action in D the Kuala Lumpur High Court against the defendants for breach of contract arising from a letter of award dated 1 June 2009 issued and awarded by the appellant in Vietnam in favour of the respondent. The respondent is claiming for loss of profits and for work done in Hanoi, Vietnam.

E **[4]** The appellant is a company incorporated in Vietnam and having its registered address at No. 32, Thach Tai Thanh, Tan Dinh Ward, District 1, Ho Chi Minh City, Vietnam and business address at Plot 1, C14, Hoa Lan St. Ward 2, Phu Nhuan Dist. Ho Chi Minh City, Vietnam.

F

[5] The respondent is a private limited company incorporated in Malaysia. The respondent's primary nature of business lies in the field of landfill gas and biogas extraction and utilisation.

G **[6]** On 9 December 2010 the respondent (as the plaintiff at the court below) filed the writ of summons and the statement of claim claiming for loss of profit and work done. Subsequently, the respondent filed an *ex parte* application pursuant to O. 6 r. 1 of the Rules of the High Court 1980 (RHC 1980) for leave to issue H and serve the notice of writ out of jurisdiction and the writ of summons and statement of claim out of jurisdiction against the appellant (ie, the 1st defendant) at the following address, namely:

(a) PLot 1, C14, Hoa Lan St. Ward 2, Phu Nhuan Dist, Ho Chi Minh City, Vietnam; and/or

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(b) 309/1, Vo Van Tan Street, Ward 5, District 3, Ho Chi Minh City, Vietnam.

[7] On 23 December 2010 the said application was allowed and an order to that effect has been granted by the High Court. It was clearly stated in the said court order that the said notice of writ outside jurisdiction and the writ of summons and the statement of claim were to be served on the 1st defendant (appellant) at the stated address therein or at any other address in the same jurisdiction (ie, in Vietnam) (di alamat-alamat berikut, atau tempat lain yang mana mereka boleh ditemui dalam bidang kuasa yang sama). In other words, based on the court order dated 23 December 2010, the relevant documents must be served on the appellant, outside jurisdiction, ie, in Vietnam.

[8] Once leave has been granted, the next step to be taken by the respondent is to affect service of those documents on the appellant at the stated addresses in Vietnam (as clearly stated in the court order). In that sense, the relevant provisions of O. 11 r. 5 and 6 of the RHC 1980 must be complied with.

[9] On 14 February 2011, the respondent served the writ of summons and the statement of claim on the appellant at the Malaysian address known as No. 27, Jalan Keranji 1, off Jalan Kedondong, Ampang Hilir, 55000 Kuala Lumpur, which they alleged to be the appellant's business address in Malaysia. (the respondent did not serve the notice of writ of summons to be served out of jurisdiction together with the writ of summons).

[10] On 7 April 2011 the appellant filed an application to set aside the service of the writ of summons and the statement of claim which was allegedly affected at the address in Kuala Lumpur on 14 February 2011. The said application was made pursuant to O. 12 r. 7 of the RHC 1980 which reads as follow:

> Rule 7. Application to set a side writ, etc. (O. 12 r. 7)
>
> (1) A Defendant to an action may at any time before entering an appearance therein, or if he has entered a conditional appearance, within 14 days after entering the appearance, apply to the court for an order setting aside the writ or service of the writ, or notice of the writ, on him, or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to serve the notice on him out of the jurisdiction.
>
> (2) An application under this rule must be made by summons.

[11] The service of the writ of summons and the statement of claim on a person by the name Mr Lee Khen Shen at the Kuala Lumpur address on 14 February 2011 while the court order dated 23 December 2010 was still in force is clearly a case of non-compliance of the said court order. The respondent failed to comply with the said court order and deliberately chose to disregard the said court order completely. The court order was never varied nor discharged when the service was affected at the Kuala Lumpur address. The court order dated 23 December 2010 was very clear on this issue, ie, the documents in question must be served on the appellant at the given address in Vietnam.

[12] The respondent did make an *ex-parte* application to vary the said court order dated 23 December 2010 and the 2nd order was granted on 25 April 2011. That was long after the writ of summons and the statement of claim was allegedly served at the Kuala Lumpur address on 14 February 2011. The variation of the order was granted to the effect that the cause papers in question were to be served on the appellant at the address: No. 32, Thach Thi Thanh Street, Tan Dinh Ward, District 1, Ho Chi Minh City, Vietnam; and service was to be done through the Government of the Socialist Republic of Vietnam at the above address.

[13] The variation order, though granted by the court was clear by itself, ie, the cause papers in question must be served outside jurisdiction at the given address in Vietnam, but not at the Kuala Lumpur address.

[14] The service of the cause papers at the Kuala Lumpur address is a clear non-compliance of the court order. The order of the court must strictly be complied with when it comes to matters on service outside jurisdiction. If service cannot be done in accordance with the said court order, then the said court order must be varied accordingly by the court. This has been stressed by the Federal Court in the case of *Pertubohan Berita Nasional Malaysia v. Stephen Kalong Ningkan* [1982] CLJ 471; [1982] CLJ (Rep) 266.

[15] The respondent cannot elect to disregard the earlier court order and instead serve the writ of summons and statement of claim on the purported business address of the appellant in Kuala Lumpur, Malaysia. Surprisingly, the respondent made another application to vary the said court order on 12 April 2011, two

months after the alleged service at the Kuala Lumpur address, to change the address for service on the appellant. However the new address was still in Vietnam, but not in Kuala Lumpur, Malaysia. This is an indication to show that the respondent themselves knew that the service of the writ of summons and the statement of claim on the purported business address of the appellant in Kuala Lumpur, Malaysia was bad service.

[16] The respondent had elected to apply for leave to issue the writ of summons using Form 3 (of the RHC 1980) for "foreign writ", instead of Form 2 for "local writ". Form 3 is for service out of jurisdiction while form 2 is for service within the jurisdiction, under O. 6 r. 1 of the RHC 1980. Since the respondent elected to use Form 3, they must follow the procedure for service outside jurisdiction as prescribed in the court order and in compliance with O. 11 rr. 5 and 6 of the RHC 1980. If the respondent intends to serve the writ of summons and the statement of claim within jurisdiction (ie, at the Kuala Lumpur address) then they must cause to be issued a local writ (as in Form 2).

[17] The respondent claimed that the Kuala Lumpur address was a purported business address of the appellant in Malaysia. The appellant denied having any business address in Malaysia as the appellant does not carry on any business activity in Malaysia. The business activities of the appellant are all centralised in Vietnam due to the nature of the business activities in biogas capture and waste treatment services for the Nam Son Landfill, in Hanoi, Vietnam. According to the appellant's certificate of investment, the appellant's business and scope of project is "to recover exhausted fumes to carry out Nam Son rubbish dumps, Soc Con suburb and Tay Mo rubbish dump, Tu Liew suburb to minimize exhaust fumes making green house effect according to clean development mechanism (CDM); build electric station to supply enough electricity for CDM project area; Ha Noi or sell to Ha Noi Environment One Member Co Ltd to Vietnam Power Corporation".

[18] The Kuala Lumpur address is merely the appellant's director's "care of" or "c/o" address (the director in question was one Dato' Lee Peng Joo). The appellant never intended to have any business address in Malaysia.

[19] The said Dato' Lee Peng Joo, a director of the appellant has affirmed an affidavit to state that the writ of summons and the statement of claim was never served on him personally. Even assuming the said Dato' Lee Peng Joo was the legal representative of the appellant in Malaysia, the documents in question must be served on him personally. If he receives the documents personally, this could mean that the documents are served on the appellant. However, on the facts of the present case, the said documents were not served on him, but on one individual known as Mr Lee Khen Shen. The respondent did not explain in its affidavits, who Mr Lee Khen Shen is and in what capacity was he accepting service of the said documents.

[20] It must be emphasised that service of a writ out of jurisdiction is an exercise of sovereignty within the country in which service is affected. It can only be affected strictly in compliance with the relevant rules prescribed for that purpose (in our case in O. 11 rr. 5 and 6 of the RHC 1980). The respondent in the present case, in applying to affect service on the appellant who is in Vietnam must comply very strictly with the prescribed procedures.

[21] In the case of *Sunkyong International Inc v. Malaysian Rubber Dvpt Corp Bhd* [1992] 3 CLJ 1531; [1992] 1 CLJ (Rep) 310, the Federal Court (endorsing the principle stated by Lord Denning MR in the case of *Afro Continental Nigeria Ltd v. Meridian Shipping Co SA* [1982] 2 Lloyd's Rep 241) ruled:

> The rationale behind this prescribed method of service is of course that our courts do not exercise their judicial power beyond their territorial limits, and further service of judicial process in a foreign country to use the grave words of Lord Denning in *Afro Continental Nigera Ltd v. Meridian Shipping Co SA* in an exercise of sovereignty in that country, which can only be done with the consent of that country. Scrutton LJ in *Vaudrey v. Nathan* when advising circumspection in exercising power to allow service out of jurisdiction opined that in some countries service out of jurisdiction to be effected there was looked upon with great disfavour.

Conclusion

[22] Based on the above consideration, we are of the view that the service of the writ of summons and the statement of claim by the respondent allegedly on the appellant affected on 14 February 2011 at the Kuala Lumpur is irregular and bad in law and must be set aside.

[23] We therefore allow the appeal with costs in the cause. We also make on order that the deposit be refunded to the appellant. The decision of the learned High Court judge dated 5 August 2011 is set aside.